

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ONEBEACON INSURANCE COMPANY,)
)
Plaintiff(s),)
)
v.)
)
HAAS INDUSTRIES, INC,)
)
Defendant(s).)
)
_____)

No. C07-3540 BZ

**AMENDED ORDER DENYING
MOTIONS FOR SUMMARY JUDGMENT**

Professional Products, Inc. (PPI) purchased electronic equipment from Omneon Video Networks (Omneon). The equipment was to be shipped to the City University of New York (City University). Omneon contracted with defendant Haas Industries, Inc. (Haas) to ship the equipment.¹ When the equipment was delivered to City University, the shipment was short equipment valued at \$105,647.

PPI filed a claim with plaintiff OneBeacon, its transit and property insurance carrier. OneBeacon paid the claim and

¹ All parties have consented to my jurisdiction, including entry of final judgment, pursuant to 28 U.S.C. § 636(c) for all proceedings.

1 then filed a subrogation claim for cargo loss against Haas to
2 recover the cost of the lost equipment. OneBeacon has moved
3 for summary judgment, or in the alternative for partial
4 summary judgment as to Haas' Sixteenth Affirmative Defense
5 that liability is limited to \$0.50 per pound. In its
6 opposition papers, Haas requests that OneBeacon's claims be
7 dismissed because Haas' payment to Omneon constituted an
8 accord and satisfaction. The court treats this request as a
9 motion for summary judgment on Haas' Thirteenth Affirmative
10 Defense.

11 **The Carmack Amendment**

12 The parties agree that this dispute is governed by the
13 Carmack Amendment, 49 U.S.C. § 14706.² Under the Amendment, a
14 carrier is liable for the "actual loss or injury to the
15 property" it carries in interstate commerce unless otherwise
16 agreed with the shipper. Id.; Ins. Co. of N. Am. v. NNR
17 Aircargo Serv. (USA), Inc., 201 F.3d 1111, 1115 (9th Cir.
18 2000); Hughes Aircraft v. N. Am. Van Lines, 970 F.2d 609, 611
19 (9th Cir. 1992); Atlantic Mut. Ins. Co. v. Yasutomi
20 Warehousing & Distribution, Inc., 326 F.Supp.2d 1123, 1126
21 (C.D. Cal. 2004) (Yasutomi).

22 **OneBeacon's Standing to Sue**

23 As an initial matter, although not adequately addressed
24 in the moving papers or during argument, a serious question
25

26 ² Although the court has reservations about whether
27 this transaction is subject to the Carmack Amendment since the
28 equipment was transported by air and Haas' bill of lading
states it is an Airbill, the parties stipulated that the
Carmack Amendment governs this dispute.

1 exists whether OneBeacon has standing to bring the instant
2 suit. Omneon is listed as the shipper and City University as
3 the consignee on the bill of lading. PPI is not listed
4 anywhere on the bill of lading and did not contract with Haas
5 to ship the equipment.

6 The Carmack Amendment provides that the carrier is
7 "liable to the person entitled to recover under the receipt
8 or bill of lading." 49 U.S.C. § 174706(a). Haas asserts
9 that "the proper parties to bring a Carmack action are the
10 parties named in the bill of lading" citing Windows, Inc. v.
11 Jordan Panel Systems, Corp., 177 F.3d 114, 118 (2nd Cir.
12 1999) (Def.'s Supp. Br. p.2, lns. 8-9). While Windows states
13 that persons who may sue under the Carmack Amendment are
14 those entitled to recover under the bill of lading, it also
15 states without any analysis, that a buyer or seller of
16 shipped goods is such a person. Here, PPI had bought the
17 goods from Omneon and was selling them to City University.

18 OneBeacon relies on a number of cases which have either
19 assumed that the owner of goods may sue under the Carmack
20 Amendment even if not named in the bill of lading, or have so
21 stated generally, without any analysis or explanation of
22 their decision. See e.g. Spray-Tek, Inc. v. Robbins Motor
23 Transp., Inc., 426 F.Supp.2d 875, 883 (W.D. Wis. 2006); Banos
24 v. Eckerd Corp., 997 F.Supp. 756, 762, (E.D. La. 1998);
25 Delaware, L.& W. R. Co. v. U. S., 123 F.Supp. 579, 581 (S.D.
26 N.Y. 1954). The court has not found a single case decided
27 after the relevant language of the Carmack Amendment was
28 amended in 1978 addressing the issue of whether an owner of

1 goods, who was not listed on or a party to the bill of
2 lading, did not negotiate with the carrier, and was not the
3 receiving party of the shipment, has standing to sue for
4 cargo loss.

5 On the one hand, considerations of judicial economy
6 suggests that the owner of the goods should be able to sue
7 the carrier directly under the Carmack Amendment. The
8 alternative would be for the owner to sue the consignor or
9 shipper who would then have to sue the carrier. On the other
10 hand, the weakness in granting OneBeacon standing is
11 illustrated by Haas' accord and satisfaction defense. After
12 the loss, Omneon presented a claim to Haas for \$154,912.50.³
13 Haas replied that its liability was limited by the bill of
14 lading to \$88.00 and tendered Omneon a check in that amount.
15 Omneon cashed the check. Absent some explanation from
16 Omneon, this would seem to be a accord and satisfaction
17 between Haas and Omneon. In response to Haas' motion,
18 OneBeacon insists that Omneon had no authority to enter into
19 an accord and satisfaction that binds PPI since it was not
20 PPI's agent. Allowing someone not a party to the bill of
21 lading to sue the carrier after it has reached an accord and
22 satisfaction with the shipper would seem to discourage
23 carriers from settling claims.

24 Under the facts of this case it is not clear that
25 OneBeacon has standing to sue under the Carmack Amendment.

27 ³ OneBeacon contends Omneon presented the claim on
28 PPI's behalf but denies Omneon was PPI's agent. No explanation
is given for why a \$154,000 claim was made for a \$105,000 loss.

1 However, I need not resolve this issue, in part because Haas
2 did not seek summary judgment on this issue and did not
3 develop a proper record, and in part because, as explained
4 below, OneBeacon has not established that Haas did not
5 successfully limit its liability.

6 **Limited Liability Under Carmack**

7 A carrier can limit its liability under the Carmack
8 Amendment.

9 If the shipper and carrier, in writing, expressly
10 waive any or all rights and remedies under this
11 part for the transportation covered by the
12 contract, the transportation provided under the
13 contract shall not be subject to the waived rights
14 and remedies and may not be subsequently
15 challenged on the ground that it violates the
16 waived rights and remedies.

17 49 U.S.C. § 14101(b)(1).

18 To limit its liability under the Carmack Amendment, the
19 carrier must:

20 (1) obtain an agreement with the shipper based on a
21 choice of liability; (2) give the shipper a
22 reasonable opportunity to choose between levels of
23 liability; and (3) issue a bill of lading prior to
24 shipment.

25 Yasutomi, 326 F.Supp.2d at 1126. Haas has the ultimate
26 burden of showing it has limited its liability. Schweitzer
27 Aircraft Corp. v. Landstar Ranger, Inc., 114 F.Supp.2d 199,
28 201 (W.D. N.Y. 2000). Here, OneBeacon insists that Haas did
not give the shipper a reasonable opportunity to choose
between levels of liability because: (1) Omneon could not
tell from the face of the bill of lading how much more the
shipping would cost if it declared the actual value of the
equipment and (2) Haas did not maintain a private tariff.

OneBeacon is incorrect on both counts.

Pursuant to the practice between Omneon and Haas, Omneon possessed blank Haas bills of lading, which Omneon completed prior to shipping.⁴ The front of Haas' bill of lading contains a conspicuous capitalized warning:

DECLARED VALUE AGREED AND UNDERSTOOD TO BE NOT
MORE THAN \$.50 PER POUND, PER PIECE, OR \$50.00
WHICHEVER IS HIGHER UNLESS HIGHER VALUE DECLARED
AND CHARGES PAID. FREIGHT BILL SUBJECT TO
CONDITIONS SET FORTH ON REVERSE SIDE.

To the left of the warning is a box marked "DECLARED VALUE FOR CARRIAGE \$" with a blank space provided to list the value of the shipment. The Conditions of Contract Carriage on the reverse side of the bill of lading again state the \$0.50 per pound liability limitation "in the absence of a higher declared value for carriage" and that "[d]eclared values for carriage in excess of \$0.50 per pound, per piece, shall be subject to an excess valuation charge." (Holster Dec. at Ex. D, ¶ 8.)⁵ Omneon left the declared value box on the bill of lading blank.

Neither side provided testimony from Omneon as to why this box was left blank or testimony from PPI, in whose shoes

⁴ OneBeacon's contention that Haas should have put the amount of the extra charge on the face of the bill is neither required by law nor commercially reasonable. Haas' bill of lading is a preprinted form, that its customers fill out. Haas is not required to list its excess valuation charges on the bill of lading by 49 U.S.C. § 14706(a)(1)(B) or the law of this circuit. Doing so would result in Haas having to reprint and redistribute the bill of lading every time its valuation charge changed, and could create confusion if customers continued to use an old form.

⁵ Moreover, Haas requires that for "shipments having declared values over \$25,000.00, [it] must be given advance notice prior to pick up." (Id. at ¶ 13.)

1 OneBeacon stands, as to whether PPI requested Omneon to
2 declare the higher value. However, it is undisputed that the
3 arrangement between Omneon and PPI was that Omneon would ship
4 the goods FOB its facility in Sunnyvale, which signifies that
5 the risk of loss passed to PPI.⁶ Furthermore, OneBeacon has
6 introduced a document titled "Order Acknowledgment" which
7 Haas apparently sent to PPI and which states that "Title and
8 risk of loss pass upon delivery to freight forwarder, Buyer
9 responsible for freight and insurance costs." It is also
10 undisputed that PPI was to reimburse Omneon for shipping
11 charges. The logical inference to be drawn from these
12 limited facts, at least for the purpose of summary judgment,
13 is that PPI did not ask Omneon to declare a higher value and
14 pay the higher shipping costs because it did not want to be
15 charged for them. This is not surprising since it appears
16 that PPI already had insurance which would cover the
17 shipment.⁷ As Judge Fletcher noted in a somewhat similar
18 dispute involving an air shipment in which the plaintiff who
19 had insured the risk argued that the carrier had not limited

20
21 ⁶ John Turk, the Vice President of Omneon, submitted a
22 declaration in support of OneBeacon's motion declaring that the
23 terms of sale between "Omneon and PPI were FOB Omneon's dock."
24 Thus Omneon had to "bear the expense and risk of putting [the
25 goods] into the possession of the carrier" at Omneon's dock.
26 See U.C.C. § 2-319(1)(a) (2008). At that point, the risk
27 transferred from Omneon to PPI. MEMC Elec. Materials, Inc. v.
28 Mitsubishi Materials Silicon Corp., 420 F.3d 1369, 1374 fn. 3
(2005).

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30 ⁷ "Under the federal common law of our circuit, [in
31 non-Carmack cases], the function served by notice of limited
32 liability is accomplished if the shipper in fact purchases
33 separate insurance, whether or not such notice is actually
34 given." Read-Rite Corp. v. Burlington Air Express, Ltd., 186
35 F.3d 1190, 1198 (9th Cir. 1999).

1 its liability, "why would [the shipper] increase its costs by
2 insuring the same cargo twice?" Read-Rite Corp v. Burlington
3 Air Express, Ltd., 186 F.3d 1190, 1198 (9th Cir. 1999);
4 quoting Travelers Indemnity Co. v. The Vessel Sam Houston, 26
5 F.3d 895, 900 (9th Cir. 1994). Asked this question during
6 argument, counsel for OneBeacon had no persuasive response.⁸

7 Nor is OneBeacon correct that Haas was required to
8 maintain a tariff. OneBeacon concedes that the ICC
9 Termination Act of 1995 eliminated the need for carriers to
10 maintain an approved tariff that provided for limitations on
11 liability. 49 U.S.C. §§ 13710(a)(4) & 14706(c)(1)(B).
12 Consolidated Freightways Corp. of Del. v. Travelers Ins. Co.,
13 2003 WL 22159468, *3 (N.D.Cal. 2003) citing Tempel Steel
14 Corp. v. Landstar Inway, Inc., 211 F.3d 1029, 1030 (7th Cir.
15 2000). Nonetheless, without citing any authority, OneBeacon
16 argues that Congress intended for carriers to continue to use
17 "private tariffs." (Pl.'s Supp. Memo at p.3, ln. 2.)

18 Section 14706(c)(1)(B) provides that:

19 [i]f the motor carrier is not required to file its
20 tariff with the Board, it shall provide under
21 section 13710(a)(1) to the shipper, on request of
22 the shipper, a written or electronic copy of the
23 rate, classification, rules, and practices upon
24 which any rate applicable to a shipment, or agreed
to between the shipper and the carrier, is based.
The copy provided by the carrier shall clearly
state the dates of applicability of the rate,
classification, rules, or practices.

25 ⁸ OneBeacon sought to distinguish Read-Rite on the
26 ground that PPI did not purchase spot insurance to cover this
27 particular shipment. Instead, the shipment was covered under a
28 general business policy. That does not explain why PPI would
want to pay a higher shipping rate to insure the equipment, if
it had already paid OneBeacon to insure the equipment under its
general business policy.

1 28 U.S.C. § 14706(c)(1)(B) (emphasis added). Here, there is
2 no evidence that Omneon or PPI ever requested a copy of Haas'
3 rates or practices, let alone that Haas did not provide it.
4 Omneon and PPI's failure to request information regarding the
5 higher rate suggests they were not interested in paying the
6 excess valuation shipment charges.

7
8 Haas presented evidence that it did maintain a higher
9 shipping rate for declared value shipments, and that Omneon
10 was made aware of that rate. Haas' comptroller, Carmen
11 Holster, provided a declaration and attached a letter sent to
12 "all customers" addressed to "Dear Valued Customer" noting
13 that it was raising its charges for declared value to "\$.70
14 per \$100.00 of value declared on the Haas bill of lading."
15 (Holster Dec. at ¶ 4.) Holster declared that a copy of the
16 letter was not kept in Omneon's file, but "from a review of
17 our accounting file [she] determined that, in keeping with
18 HAAS practice and procedure, a copy of the rate charge letter
19 was sent to Omneon on January 27, 2005." Id.⁹ Neither Omneon

20 ⁹ OneBeacon has moved to strike paragraph 4 of the
21 Holster declaration and the copy of the letter attached as
22 Exhibit B. It argues that letter was not previously disclosed
23 and that there was insufficient foundation laid to establish
24 that it was sent to Omneon. OneBeacon complains that there was
25 not a copy of the letter in Omneon's file and that the
26 accounting file in which Holster found the letter was not
27 attached to the declaration. Here, for the purpose of summary
28 judgment, Holster's declaration sets the appropriate foundation
for the court to consider the Exhibit. See Orr v. Bank of
America, 285 F.3d 767, 773 (9th Cir. 2002). That a generic
letter was not kept in individual clients' files is not
surprising as it was not specifically addressed to individual
clients. Significantly, there is no evidence that Omneon did
not receive the letter. While OneBeacon may be correct that
the letter should have been disclosed pursuant to Rule
26(a)(1)(A), excluding it at this stage is unwarranted. Lesser

1 nor PPI have disputed this evidence. OneBeacon is therefore
2 not entitled to summary judgment that Haas failed to limit
3 its liability in accordance with the Carmack Amendment.

4 **Reasonableness of Liability Limitation**

5 OneBeacon has failed to present persuasive argument or
6 authority that Haas' limitation of liability was not
7 "reasonable under the circumstances surrounding the
8 transportation" as required by 49 U.S.C. section
9 14706(c)(1)(B). Haas' comptroller declared that a \$0.50 per
10 pound limitation on liability is the industry norm for motor
11 carriers. (Holster Dec. at ¶ 5.) OneBeacon submitted a
12 declaration asserting that motor carriers' limitations of
13 liability differ greatly and there is no industry standard.
14 Given this disagreement, and the absence of other evidence on
15 the reasonableness of the limitation, genuine issues of
16 material fact on the reasonableness of the limitation exist
17 such that it is not appropriate to decide this issue on
18 summary judgment.

19 **Accord and Satisfaction**

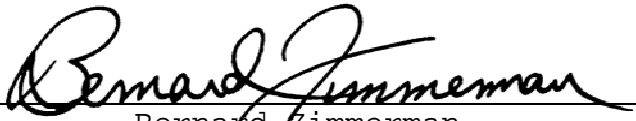
20 Nor is Haas entitled to summary judgment with respect to
21 its Thirteenth Affirmative Defense of accord and satisfaction.
22 Haas tendered a check for \$88.00 as a "settlement" for the
23 claim for the missing equipment (176 pounds of equipment at
24 \$.50 per pound) based on the limitation of liability set forth

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26 sanctions, such as shifting the cost of any additional
27 discovery required by the late disclosure, might have been
28 warranted, but were not requested. OneBeacon's motion to
strike is **DENIED**.

1 on the bill of lading. Omneon cashed the check. In
2 California, the defense of accord and satisfactions requires a
3 showing that there is "(1) a bona fide dispute between the
4 parties, (2) the debtor sends a certain sum on the express
5 condition that acceptance of it will constitute full payment,
6 and (3) the creditor so understands the transaction and
7 accepts the sum." In re Marriage of Thompson, 41 Cal.App.4th
8 1049, 1058 (1996). As noted above, Haas asserts that
9 OneBeacon lacks standing to sue it under the Carmack Amendment
10 because it was not a party to the bill of lading. Haas never
11 explains how it could have a "bonafide dispute" with a party
12 it claims lacks standing to sue it. Nor has Haas shown that
13 it sent any money to PPI or that PPI accepted it.¹⁰ Haas'
14 motion for summary judgment as to its thirteenth affirmative
15 defense is **DENIED**.

16 For the foregoing reasons, **IT IS ORDERED** that both sides'
17 motions for summary judgment are **DENIED**.

18 Dated: April 24, 2008

19 
20 Bernard Zimmerman
United States Magistrate Judge

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27 ¹⁰ There is no evidence in the record as to whether
28 Omneon transferred any of the funds it received from Haas to
PPI.